

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PEPPER BOTTINI, et al.,

Plaintiffs,

v.

DEAN DOMINGUEZ, et al.,

Defendants.

Case No. [5:16-cv-00444-PSG](#)

**ORDER REASSIGNING CASE TO A  
DISTRICT JUDGE; REPORT AND  
RECOMMENDATION REMANDING  
SUA SPONTE AND DENYING MOTION  
TO PROCEED IN FORMA PAUPERIS**

**(Re: Docket Nos. 1, 2)**

Defendants Dean Dominguez and Sandy Arvin have removed this unlawful detainer action to federal court.<sup>1</sup> The court ORDERS the Clerk of Court to reassign this case to a district judge and RECOMMENDS that the newly assigned judge REMAND the case for lack of subject matter jurisdiction<sup>2</sup> and DENY Arvin's motion to proceed in forma pauperis as frivolous.<sup>3</sup>

**I.**

Plaintiffs Pepper Bottini and Tony Bottini initiated this unlawful detainer action in state

<sup>1</sup> See Docket No. 1.

<sup>2</sup> Cf. *3925 Alameda Prop. LLC v. Brainerd*, Case No. 12-cv-4924-EMC, 2012 WL 5199170, at \*2 (N.D. Cal. Oct. 22, 2012); *Compass Bank v. Goble*, Case No. 12-cv-1885-WQH, 2012 WL 3229155, at \*2 (S.D. Cal. Aug. 3, 2012); *Louden, LLC v. Pajarillo*, Case No. 12-cv-2638-EMC, 2012 WL 3155151, at \*1 (N.D. Cal. Aug. 2, 2012); *Bank of Am., Nat'l Ass'n v. Soliven*, Case No. 10-cv-1844-IEG, 2010 WL 3636260, at \*2 (S.D. Cal. Sept. 14, 2010).

<sup>3</sup> Cf. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Hoke v. Arpaio*, 92 F.3d 1192, 1192 (9th Cir. 1996).

court against Defendants and Does 1 to 5.<sup>4</sup>

## II.

The parties have not yet consented to magistrate judge jurisdiction,<sup>5</sup> so this matter shall be reassigned to a district judge.

Removal to federal court is proper where the federal court would have original subject matter jurisdiction over the complaint.<sup>6</sup> The removal statutes are strictly construed against removal and place the burden on the defendant to demonstrate that removal is proper.<sup>7</sup>

Federal courts have original jurisdiction over civil actions “arising under the Constitution, laws, or treaties of the United States.”<sup>8</sup> A claim “arises under” federal law if, based on the “wellpleaded complaint rule,” the plaintiff alleges a federal claim for relief.<sup>9</sup> Defenses and counterclaims asserting a federal question do not satisfy this requirement.<sup>10</sup> Federal district courts also have jurisdiction over civil actions in which the matter in controversy exceeds the sum or value of \$75,000 (exclusive of interest and costs) and is between citizens of different states.<sup>11</sup>

When presented with an application to proceed in forma pauperis, a court must first determine if the applicant satisfies the economic eligibility requirement of 28 U.S.C. § 1915(a).<sup>12</sup>

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<sup>4</sup> See Docket No. 1 at 5-8.

<sup>5</sup> See 28 U.S.C. § 636(c); Fed. R. Civ. P. 72(a).

<sup>6</sup> See 28 U.S.C. § 1441.

<sup>7</sup> See *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).

<sup>8</sup> See 28 U.S.C. § 1331.

<sup>9</sup> *Vaden v. Discovery Bank*, 129 S. Ct. 1262, 1272 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> See 28 U.S.C. §1332.

<sup>12</sup> See *Franklin v. Murphy*, 745 F.2d 1221, 1226 n.5 (9th Cir. 1984).

Section 1915(a) does not require an applicant to demonstrate absolute destitution.<sup>13</sup> An IFP application will be denied and the action dismissed, however, if the party seeking IFP status has filed a pleading or petition that is legally frivolous.<sup>14</sup> A submission is “frivolous” for IFP purposes and therefore subject to summary dismissal under § 1915(e)(2)(B)(i) “where it lacks an arguable basis either in law or in fact.”<sup>15</sup>

### III.

Applying the above standards, it is clear that subject matter jurisdiction does not exist, and that Arvin’s notice of removal therefore is frivolous.

**First**, the court lacks subject matter jurisdiction under 28 U.S.C. § 1331. Arvin’s notice states that there is a federal question because Defendants’ answer “depends on the determination of Defendant’s rights and Plaintiff’s duties under federal law.”<sup>16</sup> This position lacks merit. Federal question jurisdiction depends on the contents of the plaintiff’s well-pleaded complaint and may not be predicated on the defendant’s counterclaims or defenses.<sup>17</sup> Here, Plaintiffs’ complaint asserts a claim based on state law only—that is, unlawful detainer.<sup>18</sup> This is insufficient to support federal question jurisdiction.

**Second**, given that the court lacks subject matter jurisdiction, it is clear that Arvin’s notice

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<sup>13</sup> See *McCone v. Holiday Inn Convention Ctr.*, 797 F.2d 853, 854 (10th Cir. 1982) (citing *Adkins v. E.I. Du Pont de Nemours & Co., Inc.*, 335 U.S. 331, 339 (1948)).

<sup>14</sup> See 28 U.S.C. § 1915(e)(2)(B)(i).

<sup>15</sup> *Neitzke*, 490 U.S. at 325; *Hoke*, 92 F.3d at 1192.

<sup>16</sup> Docket No. 1 at ¶ 10.

<sup>17</sup> See *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002); *ARCO Envtl. Remediation, L.L.C. v. Dep’t of Health & Envtl. Quality*, 213 F.3d 1108, 1113 (9th Cir. 2000).

<sup>18</sup> See Docket No. 1 at 5.

of removal “lacks an arguable basis either in law or in fact” and is frivolous.<sup>19</sup> In forma pauperis status thus is inappropriate.

**SO ORDERED AND RECOMMENDED.**

Dated: February 11, 2016

  
PAUL S. GREWAL  
United States Magistrate Judge

United States District Court  
Northern District of California

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<sup>19</sup> *Neitzke*, 490 U.S. at 325; *Hoke*, 92 F.3d at 1192.